



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

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The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Charles E. Grassley
Ranking Minority Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman and Senator Grassley:

This responds to your joint letter to the Director of the Federal Bureau of Investigation (FBI or Bureau) dated May 21, 2012, and further correspondence to the Attorney General and the FBI Director dated July 16, 2012, regarding a 1996 Department of Justice Task Force that reviewed work carried out by the FBI's Laboratory examiners. We apologize for our delay in responding to your letters.

Our response addresses your questions regarding both the 1996 review and the Department's recently announced historical review of prior microscopic hair comparison analysis conducted by FBI Laboratory examiners. The purpose of the latter review is not to examine the validity of microscopic hair comparison, but rather to ensure that FBI Laboratory reports and examiner testimony regarding microscopic hair comparison analysis from pre-2000 cases properly reflected the bounds of the underlying science. The FBI is committed to conducting a thorough, meaningful review and working closely with our partners in both law enforcement and the criminal defense community to ensure appropriate notification as set forth below.

The 1996 Task Force

As you are aware, in January 1996, the Department established a Task Force to review allegations surrounding practices at the FBI Laboratory in order to ensure that no defendant's right to a fair trial was jeopardized by the questioned performance of an FBI Laboratory examiner. Following the issuance of the Department of Justice Inspector General's Report on the FBI Laboratory in April 1997, the Task Force worked with prosecutors and the FBI to

identify affected cases, undertake independent reviews in cases where an FBI Laboratory examiner's scientific analysis was material to a conviction, and notify relevant prosecutors (local, state, and federal) so they could determine what information should be disclosed to defense counsel under *Brady v. Maryland*. The Task Force finished its work nearly a decade ago.

In responding to your inquiries, the Department has reviewed and relied on various historical memoranda relating to the Task Force's creation and operations. We note that on August 4, 1997, the Department wrote a letter to Senator Grassley (the Grassley letter), then Chairman of the Senate Judiciary Subcommittee on Oversight and the Courts, to outline the Task Force's review and notification procedures. We are enclosing that letter for your records. In that response, we advised that the Task Force first sought to identify cases involving the 13 examiners who were criticized in the 1997 Inspector General's report on FBI Laboratory practices, then to determine which of those cases resulted in a conviction. After identifying those cases, the Task Force was to contact the responsible federal, state, or local prosecuting authority to determine whether the examiner's work was material to the conviction. If the prosecutor determined that the work was not material to the conviction, the Task Force would obtain a written explanation for that conclusion and no further action was to be taken.

As described in the Grassley letter, if a prosecutor determined that the examiner's work was material to the conviction, an independent scientist would conduct a complete review of the examiner's findings and any related testimony. A June 6, 1997, memorandum from Acting Assistant Attorney General John C. Keeney to Department prosecutors explained the notification procedures as follows:

If you determine that the work and/or testimony of a laboratory examiner *was material* to the verdict, the FBI and Criminal Division will work with your office to arrange for an independent, complete review of the Laboratory's findings and any related testimony. The FBI is contracting with qualified forensic scientists to perform this work. . . .

Once the independent scientific review is completed, you will be so notified so that you can assess any *Brady* obligation to further disclose information to the defense.

Memorandum from Acting Assistant Attorney General John C. Keeney to All United States Attorneys (June 6, 1997) at 4. We are also providing a copy of that memorandum for your review. Similarly, a July 23, 1997 letter from FBI Deputy Director William J. Esposito to Associate Deputy Attorney General Paul Fishman stated:

6. If after receiving the additional input requested, or after initial review of the case, the prosecutor determines that the Laboratory's work was material to the conviction, a scientist outside the FBI will conduct a complete review of the Laboratory's findings and any related testimony. The FBI will be contracting with qualified scientists for this purpose;

however, prosecutors may choose their own scientist to conduct the review, but must notify the Criminal Division Task Force of the name of the scientist or laboratory they plan to use.

7. As soon as the independent scientific review is completed, the FBI will furnish the results of that review to the Criminal Division Task Force, which will notify the prosecutor and obtain an assessment of any Brady obligation to further disclose the information to the defense.

...

The process outlined above should ensure that no defendant's right to a fair trial was jeopardized by the performance of a criticized Lab examiner.

Letter from FBI Deputy Director William J. Esposito to Associate Deputy Attorney General Paul Fishman (July 23, 1997) at 2-3 (footnote omitted). We are also enclosing a copy of that memorandum for your review.

The memoranda related to the creation and workings of the Task Force do not provide further details about findings or notifications in particular cases. Nor does the Task Force appear to have collected such information in a database or kept summary statistics. A methodical and labor-intensive review of thousands of paper files would thus be required to provide information about findings or notifications in particular cases. The Bureau, while aware of the notification process, was not provided with records about which specific prosecutors or defendants were actually notified.

Current Hair Comparison Analysis Review

The FBI, in coordination with the Department, is currently engaged in a review of microscopic hair comparison reports and testimony provided by FBI Laboratory examiners prior to December 31, 1999, when mitochondrial DNA testing became routine. In contrast to the 1996 Task Force, which reviewed past cases involving 13 examiners whose work the Office of Inspector General criticized for specific instances of deficient practices, the present review does not focus on particular examiners. Instead, it focuses more broadly on reports and testimony by all FBI hair comparison examiners who found positive associations between evidentiary hair and a known hair sample. The scientific analysis of hair evidence permits a properly trained examiner to offer an opinion that a known individual can either be included or excluded as a possible source of hair collected at a crime scene. In some cases, however, FBI Laboratory examiners may have exceeded the limits of the science by overstating the conclusions that may appropriately be drawn from a positive association between crime scene evidence and a known hair sample. The Department has thus undertaken to review all cases prior to December 31, 1999, in which an FBI Laboratory examiner provided testimony or a report regarding microscopic hair comparison and a defendant was convicted or pleaded guilty.

The Department and the Bureau has sought the assistance of the Innocence Project and the National Association of Criminal Defense Lawyers (NACDL) to, among other things:

- Identify all relevant cases, particularly capital cases;
- Obtain assistance when a contributor of evidence or a prosecuting office does not respond to requests for information (*e.g.*, a request for a transcript);
- Identify and locate defense counsel and defendants for purposes of, among other things, providing notice of the review and its outcome; and
- Expedite the review of trial transcripts in capital cases.

As you know, the Department has already reached out to state governors for assistance in identifying capital cases, and we will be informing groups such as the National Association of Attorneys General, the National District Attorneys Association, National Sheriffs' Association, and International Association of Chiefs of Police of our review.

The review will encompass all known cases through December 31, 1999, in which an FBI hair examiner was assigned, to determine whether a positive association between a known sample and crime scene evidence was made. That date was chosen because the FBI Laboratory introduced the use of mitochondrial DNA testing of positive hair associations in 1996, and obtained accreditation by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board in 1998. By the end of 1999, accreditation and the full implementation of mitochondrial DNA testing had brought about changes in laboratory practices. The Department and the Bureau are assigning the highest priority to reviewing capital cases, with the next priority being other cases involving currently incarcerated individuals.

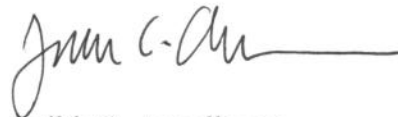
Even with this cut-off date, the review will require the Bureau to inspect more than 20,000 files. Generally, these files do not contain information such as the name of the defendant or whether the case was prosecuted. Once a file involving a positive association is identified, the Bureau will generally need to contact the law enforcement agency that submitted the hair sample for analysis to request case-related information such as the name of the defendant, whether a case was prosecuted, the identity of the prosecutor's office, and other similar information. The Bureau will then need to contact the prosecutor's office for such information, if not provided by the sample contributor, as well as to request trial transcripts if an FBI Laboratory examiner testified at trial and the case resulted in a conviction or plea.

In order to provide independent, third-party assessment throughout the process, upon completion of the review of each case, the Bureau will seek the input of the Innocence Project and NACDL concerning the results of the review. Unlike the 1996 review, the Department will provide the results of the review to defense counsel, the defendant, and the relevant prosecuting attorney's office. The prosecutors' offices will also be advised to coordinate with victim advocates regarding notice to victims. No harmless error review will be undertaken by the Department as a prerequisite to providing such notifications to the defense and the prosecutor.

The Department and the Bureau are committed to working closely with relevant stakeholders to evaluate cases involving microscopic hair comparison testimony and lab reports, all of which are more than a decade old, for purposes of conducting a thorough and meaningful review. This undertaking has required and will continue to require significant time and resources, but the Department and the Bureau believe it is necessary and appropriate to ensure that defense counsel and defendants are informed of any inappropriate testimony by FBI Laboratory examiners regarding microscopic hair comparison. Indeed, the FBI has already reviewed more than 4,500 files to determine whether or not a positive association was made and is in the process of sending out letters to contributors and prosecutors requesting additional information.

We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Judith C. Appelbaum", followed by a horizontal line.

Judith C. Appelbaum
Acting Assistant Attorney General

Enclosures